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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY ALAN HENDRICKSON,

Defendant and Appellant.

B174349

(Los Angeles County
Super. Ct. No. KA061336)

ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed January 10, 2005, be modified as follows:

1. On page 4, under the heading 3. *Sentencing considerations*, substitute “evading a peace officer” in place of “sodomy.”
2. On page 4, under the heading CONTENTIONS, substitute “evading a peace officer” in place of “sodomy.”
3. On page 7, in heading 2, substitute “*evading a peace officer*” in place of “*sodomy*.”
4. On page 8, in the first full sentence, substitute “evading a peace officer” in place of “sodomy.”

5. On page 8, delete the discussion commencing with the fifth paragraph that begins, “This issue” through the end of page 9 including footnote 2 and substitute in its place the following:

Although the applicability of *Blakely* to an upper term is pending before the California Supreme Court (see *People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182), the recent case of *United States v. Booker* (Jan. 12, 2005, No. 04-104) ---U.S. ---- [125 S.Ct. 738, ___ L.Ed.2d ___] (*Booker*), suggests that imposition of an upper term under California law does not violate *Blakely*. In upholding the Federal Sentencing Guidelines by declaring them advisory, rather than mandatory, *Booker* noted: “We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. [Citations.]” *United States v. Booker, supra*, ---U.S. ---- [125 S.Ct. at p. 750].) Because a trial court in California has discretion to impose an upper, middle or lower term, application of *Booker* indicates imposition of an upper term under California’s determinate sentencing law does not violate *Blakely*. Accordingly, Hendrickson’s claim with respect to the upper term for evading a peace officer fails.

Moreover, even accepting Hendrickson’s view of *Blakely*, the same result obtains. The jury found Hendrickson murdered Carol in the commission of robbery, carjacking and sodomy. The fact Hendrickson committed murder in the commission of these felonies supported the special circumstance allegation that resulted in the imposition of a term of life without the possibility of parole. The trial court stayed the terms imposed for robbery, carjacking and sodomy under Penal Code section 654 based on its belief it could not impose a term of life without the possibility of parole for special circumstance murder and impose a determinate term for the felonies underlying the special circumstances. However, only one of the special circumstance findings was needed to support the term of life without the possibility of parole. Because the jury found three special circumstance allegations true, there was a superabundance of special circumstance findings available. It follows that the trial court was required to stay the punishment

associated with only one of the three underlying offenses. Thus, the trial court could have, but did not impose a consecutive term for the two offenses that were not needed to support the term of life without the possibility of parole. The availability of two counts for which the trial court could have, but did not, impose a consecutive term constitutes a valid factor in aggravation. (Cal. Rules of Court, rule 4.421(a)(7).) A single factor in aggravation is sufficient to support imposition of an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Kelley* (1997) 52 Cal.App.4th 568, 581; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) Because the trial court specifically found no factors in mitigation and the trial court had available a factor in aggravation that survives Hendrickson's *Blakely* attack, we confidently conclude the trial court would have imposed the upper term for evading a peace officer based on this factor. Because there is no reasonable probability the trial court would impose a different sentence, remand for resentencing is unnecessary. (*People v. Price* (1991) 1 Cal.4th 324, 492; *People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1263-1264; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1759.)

For the foregoing reasons, Hendrickson's claim of error in the imposition of an upper term for evading a peace officer fails.

[There is no change in the judgment.]